

SUMMARY OF TESTIMONY ON HOUSE BILLS 5065-5073  
by Chris A. Shafer  
NOVEMBER 7, 2007

- I. **Introduction** - I appreciate the opportunity to testify today concerning House Bills 5065-5073. I am a Professor at Thomas M. Cooley Law School and teach primarily Constitutional Law, Water Law and Natural Resources Law, but have also taught Federal Administrative Law and Property Law. Prior to joining the Cooley faculty ten years ago, I worked in the DNR and DEQ for over 19 years and supervised six statutes that regulated construction activities along the Great Lakes shoreline and on lakes, streams and wetlands.
  
- II. **Purpose of Testimony** – I have been asked to provide some background and legal context regarding riparian rights, the public trust doctrine and reasonable use, and how the package of bills contributes to the long-term legal protection for Michigan’s water resources. So that’s what I’ll try to do and answer any questions that the Committee may have for me. One overall theme for my testimony is that excessive water withdrawals can be very damaging to riparian rights, aquatic habitat, navigation and recreational uses on our lakes and streams.
  
- III. **Legal Context** – Michigan is primarily a common law, riparian law state that follows the reasonable use doctrine and has a strong history of public trust administration. Until the 2006 amendments to Part 327 of NREPA were enacted, Michigan was one of the last remaining pure common law riparian states in the eastern half of the country.
  - A. **Riparian rights** are rights incident to ownership of land along and adjacent to a lake or stream. These are sometimes called “littoral rights” on the Great Lakes and coastal waters, but riparian rights is the generally used term. *See Theis v. Howland*, 424 Mich 282, 288 FN2 (1985).
    1. There are four specific riparian rights:
      - a) Use of water for domestic and other purposes;
      - b) Access to navigable waters;
      - c) To wharf out to navigability;
      - d) The right to accretions. (*Hilt v. Weber*, 252, Mich 198, 225 (1930)).
    2. Riparian rights are property rights and must be compensated for if taken, except for the federal government exercising its navigation servitude. (*See id.*)
  - B. **The Public Trust Doctrine** – The basic tenant of the public trust doctrine is that certain natural resources, especially the waters and beds of the sea coast and navigable lakes and rivers, are of such importance to the public that they are incapable of purely private ownership and control.
    1. This is an ancient and venerable doctrine that traces its roots to Roman Law, in the Institutes of Justinian in the 6<sup>th</sup> century A.D., and was incorporated into English common law and early American common law for tidelands and coastal waters. *See Martin v. Waddell’s Lessee*, 41 U.S. 367, 410 (1842), and *Shively v. Bowlby*, 152 U.S. 1, 13 (1894).

2. The doctrine migrated into freshwater up the Mississippi in *Barney v. Keokuk*, 94 U.S. 324, 336 (1876), and into the Great Lakes in *Illinois Central R. Co. v. Illinois*, 146 U.S. 387 (1892).
3. **Protected uses** were originally limited to three – commerce, fishing and navigation. *See id.* at 452. The public trust doctrine evolved over time to embrace ecological values and fish and wildlife habitat (*see Marks v. Whitney*, 6 Cal.3d 251, 259-260 (1971)), floodplains and wetlands (*see Just v. Marinette Co.* 201 N.W.2d 761, 768 (1972)), swimming and recreational boating (*see the Great Lakes Submerged Lands Act*, Section 2, originally MCL 322.701 *et seq.* and now codified at Part 325, Great Lakes Submerged Lands, in NREPA, MCL 324.32501 *et seq.*), and most recently to confirm a right of public beach access and lateral passage along our Great Lakes shorelines below the ordinary high-water mark in *Glass v. Goeckel*, 473 Mich. 667, 674-675 (2005).
4. In addition to the uses protected by the public trust doctrine, a second key aspect of the doctrine is the **state's duty** to protect public trust resources and values:
  - a) The nature of the trust is different in character from lands held by a state in its proprietary capacity, such as state forests and state parks. *See Illinois Central, supra* at 452.
  - b) As the Supreme Court stated in *Illinois Central*: “The State can no more abdicate its trust over property in which the whole people are interested, like navigable waters and the soils under them, ... then it can abdicate its police powers in the administration of government and the preservation of the peace.” *Id.* at 453.
  - c) The Michigan Supreme Court said it best in *Collins v. Gerhardt*, 237 Mich. 38, 49 (1926), a case involving trout fishing on the Pine River: “So long as the water flows and fish swim in Pine river, the people may fish at their pleasure in any part of the stream subject only to the restraints and regulations imposed by the state. In this right they are protected by a *high, solemn and perpetual* trust, which it is the duty of the State to forever maintain.” (Emphasis in original.)
  - d) So there are two key dimensions to the public trust – a broad set of protected uses of lakes and streams, and a mandatory duty of the state to protect the public trust uses and values. Consequently, the state has standing to enforce the public trust in state courts.

**C. Reasonable Use Principles** – Michigan is a common law reasonable use state (*see Dumont v. Kellogg*, 29 Mich. 420, 425 (1874)), that follows these key principles:

1. Absolute right of riparian owners to use water for domestic purposes, which is considered to be a “natural” right. *See Thompson v.ENZ*, 379 Mich. 667, 686 (1967). All other commercial or recreational uses are “artificial” uses subject to shared rights with other riparian owners. *See id.*

2. Excessive or unreasonable withdrawal of water is actionable, but “injury that is incidental to a reasonable enjoyment of the common right can demand no redress.” *Dumont, supra* at 425. See also, *Schenk v. City of Ann Arbor*, 196 Mich 75, 91 (1917) applying the reasonable use doctrine to groundwater.
3. There is a preference, but no longer a mandatory limitation for “on tract” use on riparian property or on property overlying an aquifer. See *Thompson, supra* at 686-687, as modified by *M.C.W.C. v. Nestlé*, 269 Mich. App. 25, 71 (2005).
4. Michigan courts will use a reasonable use balancing test to resolve conflicts among competing water users that reflects the principles enumerated above, along with the “nature of the water source and its attributes”, “the economic harm and benefit to the parties”, “the social benefits and costs of the use, such as its effects on fishing, navigation and conservation”, and “the extent, duration, necessity, and application of the use, including any effects on the quantity, quality, and level of the water.” *Nestlé, supra* at 72-73.
5. Downstream riparians or riparians on a lake can challenge in court and enjoin excessive or unreasonable withdrawals and uses of water, including specifically agricultural irrigation, that are harming their riparian rights. See *Hoover v. Crane*, 362 Mich. 36, 42 (1960).
6. Note that the trend in the eastern half of the United States is toward “**regulated riparianism**” where some type of administrative permit system is overlaid on the common law regime, in some cases supplanting it and in others supplementing the state’s common law. Nineteen states have some form of regulated riparianism, and with the 2006 amendments to Part 327, Michigan took the first step in this direction and became the 20<sup>th</sup> state. See *Sax, et al.*, *Legal Control of Water Resources*, 4<sup>th</sup> ed., at 104 FN1 (2006).

**IV. How the House Package of Withdrawal Bills Significantly Increases Legal Protection of Michigan’s Water Resources** - There are many positive aspects of the package of withdrawal bills, but I want to highlight two categories of amendments that significantly improve protection of Michigan’s water resources – these are lowered thresholds of withdrawals subject to site specific assessments and/or permit requirements, and clear standards for permit decisions that reflect public trust and reasonable use principles.

**A. Lower Thresholds For Site Specific Assessments or Permits:**

– **HB 5068 - §32723(1)(a)-(d)** – lowers withdrawal amounts subject to permit requirements from 2 million gpd to 1 million gpd for inland waters, and from 5 million gpd to 2 million gpd for the Great Lakes. Although I believe these thresholds are still too high, this is a very positive step forward;

– **HB 5068 - §32723(1)(E),(F) & (G)** – new provisions to require permits for more than 5% reduction in streamflow, a withdrawal from a “sensitive water resource area,” or a withdrawal that the assessment tool “indicates is likely to cause an adverse resource

impact.” These are very positive amendments because the criteria specified in §32723 for permitting are much broader than just “adverse resource impact” with its very limited definition in §32701(a), and the site specific permit determinations will lead to a much more thorough evaluation of impacts than the assessment tool can provide;

– **HB 5068 - §32723(16)(b)** – eliminates the so-called agricultural exemption of a 2 million gpd withdrawal over a 90-day period. This would subject large agricultural withdrawals to site specific assessments and permitting, as they should be given their potential for significant adverse impacts on other water users and the aquatic environment;

– **HB 5069 - §32722(7)** – authorizes the DEQ to designate an area as a “sensitive water resource” that triggers additional site specific determinations and permit requirements;

– **HB 5072** - Amends the Safe Drinking Water Act §17(4) to lower the withdrawal threshold subject to permitting criteria of §32723 from 250,000 gpd to 100,000 gpd for bottled drinking water, which is appropriate because this amounts to a total diversion from the source watershed.

**B. Clear Standards For Permit Decisions That Reflect Public Trust and Reasonable Use Principles:**

– **HB 5068 - §32723 (6), (7), (8) & (9)** – specific statutory standards that reflect public trust and reasonable use principles in the required “public trust” and “public interest” determinations, and that provide a clear expression of the public trust uses, values and duty of the state to protect Michigan’s water resources from unreasonable water withdrawals;

– These clear standards are essential to give sufficient guidance to the administrative agency, in this case the DEQ, in applying the statute to large water withdrawals, and to regulated landowners and permit applicants as to what criteria and standards will be applied to large water withdrawals, thus providing greater certainty in the regulatory process.

**V. Conclusion** – The primary concept here is that Michigan’s waters are public resources that are essential to the state’s economy, to domestic use by our residents, and to the state’s environmental and recreational values and, therefore, must be carefully protected to prevent excessive use and unreasonable commercial exploitation. This package of bills, though not perfect, represents a major step forward in establishing a public stewardship program for our lakes, streams, and groundwater resources, and for ensuring long-term protection of Michigan’s water resources.

I’d be happy to respond to any questions that you may have.